

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1905.

No. 1517.

CHARLES WHITE, APPELLANT,

vs.

POSTAL TELEGRAPH AND CABLE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption.....	<i>a</i>	1
Particulars of demand	1	1
Certificate of proceedings before justice of the peace.....	2	2
Memorandum: Verdict for defendant.	3	2
Judgment, appeal, and penalty of bond fixed.....	3	3
Memorandum as to deposit in lieu of bond.....	4	3
Memorandum: Time to settle exceptions and file transcript extended	4	3
Bill of exceptions made part of record.....	5	3
Bill of exceptions.....	6	4
Testimony of E. Scott Douglass.	6	4
Madge Staley	8	6
Gertrude Ellis.....	10	7
Jennie Harvey.....	11	8
Stipulation of counsel.	12	8
Testimony of Earnest Barnes.....	12	8
Jas. L. Chappell	14	10
John D. Prosser.....	15	11
Henry Y. Simmons.....	16	11
George W. Ribble.....	17	12
Jennie Harvey (recalled).....	17	12
Time to file transcript extended	19	13
Præcipe for transcript.....	19	13
Clerk's certificate.....	20	13

In the Court of Appeals of the District of Columbia.

CHARLES WHITE, Appellant,
vs.
POSTAL TELEGRAPH AND CABLE COMPANY. } No. 1517.

a Supreme Court of the District of Columbia.

CHARLES WHITE, Plaintiff,
vs.
POSTAL TELEGRAPH AND CABLE COMPANY, } No. 46642. At Law.
Defendant.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit :—

1 *Particulars of Demand.*

Filed Dec. 14, 1903.

WASHINGTON, D. C., Nov. 21, 1903.

Postal Telegraph and Cable Company to Charles White, Dr.

For money received by the Postal Telegraph and Cable Co., May 27, 1903, from Gasch Bros., 1326 New York avenue, N. W., Washington, D. C., to the use of Charles White, \$75.00.

Certificate of Justice of the Peace on Appeal.

Filed Dec. 14, 1903.

In Justice's Court of the District of Columbia, Sub-district No. 1.

CHARLES WHITE, Plaintiff,	}	No. 2565. 46642.
vs.		
POSTAL TELEGRAPH AND CABLE COMPANY, De- fendant.		

Date. 1903.	Proceedings.
November 21.	Deposit made for costs.
"	" Issued summons returnable November 24th at 3 p. m.
"	" Summons returned served personally.
"	24. Parties appeared and on motion of defendant con- tinued to Dec. 1 at 3 p. m.
Dec.	1. Parties appeared and joined issue and went to trial, witnesses called and sworn, and without finishing cause continued to Dec. 2 at 3 p. m.
"	2. Trial resumed and finished. Cause argued by coun- sel and submitted.
"	Judgment withheld by court until Dec. 5th, when
"	5. Judgment was given for plaintiff for \$75, debt and \$2.10 costs.
"	Appeal noted by defendant.
"	11. Appeal perfected with George Ribble surety.

I, Charles S. Bundy, justice of the peace in and for the said sub-district, do hereby certify that the foregoing is a true copy of my docket entries and of all the proceedings had before me in the above cause, and that the annexed documents are all the original papers filed in said cause.

3 Given under my hand and seal this 12th day of December
A. D. 1903.

Costs paid by plaintiff.....	\$2.10
Costs paid by defendant	2.10

[SEAL.]

CHARLES S. BUNDY,
Justice of the Peace.

Address, No. 416-18 5th St., N. W., Columbian building.

(Endorsed :) We appear for the defendant Postal Telegraph Cable
Co. Millan & Smith.

Memorandum.

November 14, 1904.—Verdict for defendant.

Certificate of Justice of the Peace on Appeal.

Filed Dec. 14, 1903.

In Justice's Court of the District of Columbia, Sub-district No. 1.

CHARLES WHITE, Plaintiff,	}	No. 2565. 46642.
vs.		
POSTAL TELEGRAPH AND CABLE COMPANY, Defendant.		

Date. 1903.	Proceedings.
November 21.	Deposit made for costs.
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"	2. Trial resumed and finished. Cause argued by counsel and submitted.
"	Judgment withheld by court until Dec. 5th, when
"	5. Judgment was given for plaintiff for \$75, debt and \$2.10 costs.
"	Appeal noted by defendant.
"	11. Appeal perfected with George Ribble surety.

I, Charles S. Bundy, justice of the peace in and for the said sub-district, do hereby certify that the foregoing is a true copy of my docket entries and of all the proceedings had before me in the above cause, and that the annexed documents are all the original papers filed in said cause.

3 Given under my hand and seal this 12th day of December A. D. 1903.

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Costs paid by defendant	2.10

CHARLES S. BUNDY,
Justice of the Peace.

[SEAL.]

Address, No. 416-18 5th St., N. W., Columbian building.

(Endorsed :) We appear for the defendant Postal Telegraph Cable Co. Millan & Smith.

Memorandum.

November 14, 1904.—Verdict for defendant.

Supreme Court of the District of Columbia.

MONDAY, November 21, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * *

CHARLES WHITE, Pl'ff, Appellee,	} At Law. No. 46642.
vs.	
POSTAL TELEGRAPH & CABLE Co., Def't, Appellant.	

The time within which to move for a new trial having expired, judgment on verdict is ordered: Therefore it is considered
 4 that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff its cost of defense to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and bond thereon fixed in penalty of fifty dollars.

Memoranda.

December 9, 1904.—\$50 deposited by appellant in lieu of appeal bond.

December 21, 1904.—Time to settle exceptions and file transcript in Court of Appeals extended to January 15, 1905.

5 Supreme Court of the District of Columbia.

SATURDAY, December 31, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * *

CHARLES WHITE, &c., Pl'ff,	} At Law. No. 46642.
v.	
THE POSTAL TELEGRAPH-CABLE Co., Def't.	

Now comes here again the plaintiff, by his attorneys, and tenders to the court here his bill of exceptions taken during the trial of this cause, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

Bill of Exceptions.

Filed Jan. 10, 1905.

In the Supreme Court of the District of Columbia.

CHAS. WHITE, Trading as Chas. White & Co.,
Plaintiff,

vs.

THE POSTAL TELEGRAPH-CABLE Co., Defend-
ant.

At Law. No. 46642.

Be it remembered that at the trial of this case, on the 10th day of November, 1904, before the Hon. Job Barnard, an associate justice of the supreme court of the District of Columbia, and a jury regularly empanelled, and sworn to try the issues joined between the plaintiff and the defendant herein, the plaintiff to sustain the issue on his part joined, first called as a witness on his behalf E. SCOTT DOUGLASS, who gave evidence tending to prove that he is a member of the law firm of Douglass & Douglass, and was a member thereof on the 28th day of May, 1903; that before that date his firm had been attorneys for the plaintiff in the prosecution and settlement of a certain claim, and as a result certain promissory notes, bearing interest, belonging to the plaintiff, were left with them by the plaintiff for the purpose of collecting the interest thereon from time to time and that his firm was the agent of the plaintiff for that purpose. That Gasch Bros., real estate dealers in this city were the agents of the makers of the notes, and when installments of interest became due it was customary to send to Gasch Bros. for it. That on May 27th, 1903, an installment of interest, amounting to \$75 became due on the notes, and after calling up Gasch Bros., he called in his stenographer, Miss Ellis

7 and dictated a letter to Gasch Bros., and a receipt, and instructed Miss Ellis to call a messenger and send the letter and receipt to Gasch Bros., and get an answer. Subsequently a messenger from the Postal Telegraph Cable Co., came to his office and he gave him instructions to get the letter from Miss Ellis, take it to the office of Gasch Bros., and bring back an answer; that he did not see the boy again the same day; that he discovered that the money was missing in two or three days, and made inquiry in his office about the matter; that the reason he did not discover that the money was missing earlier was that the loss was only ascertained when he came to adjust Mr. White's account; that an answer to the letter to Gasch Bros. or the money was never received by him; that after the discovery of the loss, he called up the Postal Telegraph Cable Co., and reported to them the failure to receive the return message; that the Postal Telegraph Cable Co., had not, up to that time, received pay for the message; that he saw the messenger boy on two occasions

and the boy made a statement in the presence of a gentleman from the Postal Telegraph Cable Co., who, he thinks, was the manager; that he examined the boy and the boy said he had delivered the letter to a lady in the office of Gasch Bros., and that she put something in a straw colored envelope and gave the envelope to him; that he did not know what was in the envelope, but brought it to the office of Douglass & Douglass; that he (the witness) then called in Miss Harvey and Miss Ellis, the two stenographers in the office, and asked the boy which one he gave it to, and he pointed out Miss Harvey, and said he gave it to her in the presence of the other young lady, Miss Ellis; that the call was charged to the account of Douglass & Douglass and the bill was paid in regular course of business.

Here a paper purporting to be a bill from the Postal Telegraph Cable Co., to Douglass & Douglass, dated May 31st, 1903, for \$7.71, and containing an item as follows—"May 27, Fendall Bldg.—1326 N. Y. Ave., 20 cents," was shown the witness and he identified the bill and was asked if it contained a charge for the messenger service in question, to which he replied that it did. The witness was then

8 shown a check dated July 6th, 1903, signed Douglass & Douglass, number 4899, and drawn to the order of "Postal Telegraph Cable Co." for \$7.71 on the American national bank, Washington, D. C., and marked "paid," and asked if that check was drawn by his firm for the bill rendered and if it had been paid, to which he replied that the check was in payment of the bill, and had been paid. The foregoing papers were then put in evidence, without objection.

On cross examination the witness gave evidence tending to prove that it was not a fact that the letter was written by Miss Ellis and delivered by her to the boy without his having seen the boy; that he did not know who called the messenger; that the boy came up to his office on two occasions afterwards, once with the manager of the company and again with a detective; that he had two clerks in his office and an office boy; that the office boy was sick at home the day the messenger was called to go to Gasch Bros.; that a Mr. Saul and a Mr. David also occupied rooms in the same suite of rooms with his firm; that the firm of Douglass & Douglass had collected money before for Chas. White; that the particular \$75 had not been paid to White; that he never caused the messenger boy to be arrested, but the Postal Telegraph Cable Co., requested him to use his influence with the police department to make an investigation, which he did, and the boy was brought to his office by a detective; that he does not know who made the request on behalf of the Postal Telegraph Cable Co.; that it was not two weeks after the loss that he notified the Postal Telegraph Cable Co.; that he did not testify in the trial of the case before the justice of the peace that it was two weeks; that his firm is still the agent of Chas. White.

Miss MADGE STALEY, a witness next called on behalf of the plaintiff gave evidence tending to prove that she is the bookkeeper in the office of Gasch Bros., and was so employed by them on the 27th day of May, 1903; that on that day a messenger brought a letter to her which contained a request from Douglass & Douglass for \$75, and a receipt for that amount; that she put \$75 in an envelope and gave it to the messenger; that she does not know whether he was from the Postal Telegraph Cable Company or not.

9 Here the witness was shown the following papers which she identified as being the letter and receipt referred to, and they were put in evidence without objection:

"MAY 27TH, 1903.

"Gasch Bros., 1326 New York Ave., city.

GENTLEMEN: We enclose you herewith receipt for \$75 for six months' interest upon two notes of \$1666.66 and \$833.33, secured by a deed of trust upon property owned by the Metzgerott estate, known as the Columbia theatre. Kindly send check by bearer.

Very truly yours,

(Signed)

DOUGLASS & DOUGLASS."

ESD/E.

"\$75.00.

MAY 27TH, 1903.

Received of Gasch Brothers, the sum of seventy-five (75) dollars the same being six months' interest upon two notes of \$1666.66 and \$833.33, payable to the order of E. S. Douglass, and secured by a deed of trust dated October 24th, 1902, executed by Henerietta P. Metzgerott to Chas. A. Douglass and Julius A. Maedel, trustees.

(Signed)

DOUGLASS & DOUGLASS."

The witness testified further that she did not send a check for the reason that Mr. Gasch was not there to sign it; that she placed the money in a white envelope, and the boy was standing in front of the counter; that he was in a position to see what she was doing, but does not know whether or not he was looking; that she handed

10 him the envelope and does not remember whether or not it was addressed; that the boy then went out.

On cross examination the witness gave evidence tending to prove that there is a high counter in the office of Gasch Bros. and a brass net-work above it with a window for the use of customers; that the safe is kept in the rear of the office, a considerable distance from the window; that she went to the safe, got the money, and gave it to the messenger in an envelope without having any conversation with him; that she does not know that the boy saw her place the money in the envelope; that the net work is close and difficult to see through; that she does not remember the size of the envelope, and knows it was white only because that was the only color used; that she was called up about two weeks later by telephone and asked

about the matter by someone from the office of Douglass & Douglass; that she does not know whether any one else in the office of Gasch Bros., had been spoken to about it before that or not; that she does not remember whether the bills were folded, but knows she put them in small envelope; that she does not know how many bills there were nor how large a package they made.

Miss GERTRUDE ELLIS, a witness next called on behalf of the complainants gave evidence tending to prove that she is a stenographer in the office of Douglass & Douglass and was so employed by them on the 27th day of May 1903; that the offices of Douglass & Douglass were at that time in the Fendall building Four and a half and D streets; that on May 27th, 1903, Mr. E. S. Douglass dictated a letter and receipt to her and directed that she call a messenger and send them to Gasch Bros., 1326 New York Ave., N. W.; that the regular office boy was not there that day; that she called up a messenger from the Postal Telegraph Cable Co., using the call box in the office for that purpose; that a messenger boy came in response to the call, and had on the badge of the Postal Telegraph Cable Co.; that she gave him the letter addressed to Gasch Bros., with instructions where to take it, and to bring back an answer; that she

11 did not see the boy again that day; that the next time she saw him was, to the best of her recollection, two or three days subsequently, when the boy came to the office with the manager of the company; that he did not return the day the message was sent so far as she knows of her own personal knowledge; that the boy did not deliver an answer to her that day or afterwards; that she was present at the interview between Mr. Douglass, the boy, the manager of the company, and Miss Harvey; that the boy stated then that he delivered the letter to Gasch Bros., received an answer and returned with it to the office of Douglass & Douglass and delivered it to Miss Harvey; that herself, Miss Harvey and the office boy, who was at home sick that day, were the only employees of the firm of Douglass & Douglass at that time.

On cross-examination the witness gave evidence tending to prove that she wrote the letter that was delivered by her to the boy, that she did not see him again that day; that she gave the letter to the boy in the reception room, and does not know whether the boy saw Mr. Douglass or not; that she told the boy to bring back an answer; that her attention was called to the loss by Mr. Douglass the next day; that she then called up Gasch Bros., to find out if an answer had been sent and then made a thorough investigation in the office; that she is the bookkeeper, and investigated the books; that the attention of the Postal Telegraph Cable Co. was called to the fact of the loss in two or three days; that she has no recollection of testifying that it was two weeks before the justice of the peace; that she made a thorough search of the office, and inquired of others, but got no trace of the lost letter; that she thinks the boy stated at the interview above mentioned that the envelope given him at Gasch Bros., was straw-colored.

Miss JENNIE HARVEY a witness next called on behalf of the plaintiff gave evidence tending to prove that she was employed on May 27, 1903, as stenographer in the office of Douglass & Douglass at the Fendall building; that she knows nothing of the sending of a letter to Gasch Bros., by a messenger boy on that date, except that a messenger boy came to her in the afternoon of that day and
12 asked her to give him authority to charge a call for Douglass & Douglass; that she took the form which he handed her and wrote "Chg. to Douglass & Douglass" on the back of it and gave it back to the boy; that the boy said he had forgotten to get instructions to charge the call; that the boy did not at that time, nor any other time, deliver the letter or package in question to her or to Miss Ellis in her presence; that all she knows about it is the fact that she wrote the order to charge the call on the back of the slip.

Stipulation of Counsel.

Thereupon it was admitted by counsel for the defendant that the Postal Telegraph Cable Co., is a corporation, having offices and doing business in the city of Washington in the District of Columbia; that a part of their business is the carrying on of a messenger service.

Whereupon the plaintiff announced the close of his evidence, and thereupon the defendant first called as a witness on its behalf EARNEST BARNES who gave evidence tending to prove that he is now employed by the Postal Telegraph Cable Co., and was in the same employ on the 27th day of May, 1903; that he is the messenger that responded to the call from the office of Douglass & Douglass; that upon reaching the office of Douglass & Douglass, Miss Ellis gave him a note to take to 1326 N. Y. Ave., N. W.; that he took the letter and brought back the answer and delivered it to Miss Ellis, and then returned to the office at 6th and B streets, N. W.; that the operator told him to get an order to charge the call and he went back and got Miss Harvey to mark the slip "charge."

The witness identified the following paper, which was put in evidence without objection:

13

Copy.

Form 56. Sp'l.

Postal Telegraph-Cable Co.

No. 29649.

District Messenger Service. Messenger Service Rates.

From Sixth & B Streets N. W. Office, Opposite B. & P. Depot,
Washington, D. C.

DATE, 5, 27, '3.

Called by 100 Fen. bldg., 344-D.

Messenger.	Called.	Returned.	Occupied.	Paid.	Collect.	Charge.
245	225	305	XXX	XXX	.20

Where sent, 1326 N. Y. Ave.

Rec'd by Gasch Bros.,

S.

Detained — hours — min. By — — —.

(On the back is the following endorsement :) "Chg. Douglass & Douglass."

That this was the ticket he carried out, and that Miss Harvey wrote the words on the back—that they were not written when the letter was delivered to Miss Ellis; that he had the slip signed at Gasch Bros., and if he had known there was money in it he would have gotten Miss Ellis to sign it; that he forgot all about having it signed; that the memorandum to charge the call was put on slip the same day, about five minutes after he delivered the letter; that the signature of Gasch Bros. was put on by Miss Staley; that he did not hear anything about the loss for two weeks, when Mr. Simmons sent for him and they went to the office of Douglass & Douglass and saw Mr. Douglass, Miss Harvey and Miss Ellis; that he was asked to whom he delivered the return letter and pointed out Miss Ellis, and Miss Ellis said he did not; that he did not see Mr. Douglass when he responded to the call, but went into the clerk's room and Miss Ellis gave him the directions; that she did not tell him what was in the letter nor did Miss Staley say what was in the reply; that he did not see what Miss Staley put in the envelope; 14 that he heard Miss Ellis and Mr. Douglass testify before the justice of the peace and both of them said it was two weeks before they reported the loss; that he does not remember what they said as to why it was not reported earlier.

On cross-examination the witness gave evidence tending to prove that he continued work for the Postal Telegraph Cable Co., four or five days after the 27th of May, 1903; that he was not discharged, but left because his wheel broke and was told that he could come back when it had been repaired; that when he returned the answer from Gasch Bros. and delivered it to Miss Ellis, Miss Harvey was present; that he did not take a receipt because he forgot it; that the rules of the company require a receipt to be taken; that after he delivered the letter, he went to his place of duty and was sent back for authority to charge the call; that Miss Harvey wrote "Chg. Douglass & Douglass" on back of slip; that he did not give her the letter from Gasch Bros. at that time, and the endorsement she made was not a receipt for the letter, but simply an order to charge the call; that he delivered return letter to Miss Ellis, and did not testify before the justice of the peace that he delivered it to Miss Harvey; that the slip above mentioned was the only paper he had with him; that he is fifteen years old, had been seven months in the employ of the company, and knew the young ladies in office of Douglass & Douglass, having been there often; that he does not remember color of envelope, nor whether or not it was sealed.

JAS. L. CHAPPELL, a witness next called on behalf of the defendant gave evidence tending to prove that he has been connected with the Postal Telegraph Cable Co., eleven years; that on May 27, 1903, he was in charge of the station of that company at 6th and B streets, N. W.; that he remembers a call from the office of Douglass & Douglass, but there was no order to charge on the slip and he sent Barnes back to get authority to charge, and in short time Barnes returned with slip endorsed on back "Chg. Douglass & Douglass;" that he did not hear anything of the alleged loss until Mr. Simmons told him about it, and he does not remember how long that was after the service was performed; that Barnes
15 had been employed in his office some time before this, and he had never had any complaint about him; that messenger boys are supplied with only one blank for each call and there is no other one for return service; that he heard Miss Ellis and Mr. Douglass testify before the justice of the peace and they both said it was two or three weeks before the loss was reported.

On cross-examination the witness gave evidence tending to prove that there is no regular place on the slip used by the messenger boys for a receipt for any return service, but as a general rule the receipt is written on the back; that the only way his company knows the service has been performed is by receiving the pay for the service, and in this case, it received the equivalent—an order to charge; that when Barnes came back and said he had delivered the letter there was no writing on the back of the slip,—that the writing was put on when Barnes was sent back to get the order to charge the account of Douglass & Douglass for the service.

JOHN D. PROSSER a witness next called on behalf of the defendant gave evidence tending to prove that he is the manager of the Postal Telegraph Cable Co., and that he did not authorize Douglass & Douglass to have Barnes arrested; that when a package or letter is presented to them for delivery, if they knew it contains money, it will only be carried at the owner's risk; that being the custom of the company; that he heard Mr. Douglass & Miss Ellis testify before the justice of the peace and they both said it was two or three weeks before the loss was reported to the Postal Telegraph — Company.

On cross-examination the witness gave evidence tending to prove that the usage of his company in not carrying money packages except at the owner's risk was not the subject of any general or special notice to customers, but was simply the custom of the company; that no mention of such a custom or usage is on any of the literature of the company or upon any notice or sign in the office of the company; that the slip used by Barnes on this occasion was the form in use at that time, and contains no notice of the usage or custom of the company as to the carriage of money packages; that the Postal Telegraph Cable Co. was organized under the laws of New York State, and has offices in Washington and carries on, as a part of its

16 business, a messenger service for the delivery for the public of letters, parcels, and the like for hire; that on receiving a letter or parcel for delivery, no question is asked about the contents; that his company presumes that the sender will notify the company if it contains valuables; that the primary business of the messenger service of his company is to deliver and collect telegrams, but they also perform messenger service such as can be carried on by boys walking or on bicycles; that the company has boxes installed in business offices and private houses for use in calling messengers, and charges are made according to the distance the messenger has to go and not according to the size or value of the letter or parcel.

HENRY Y. SIMMONS a witness next called on behalf of the defendant gave evidence tending to prove that he is in the employ of the Postal Telegraph Cable Co., and is manager of the messengers; that any failure of messengers to perform their duty properly is always reported to him; that the complaint of Douglass & Douglass was called to his attention about two weeks after May 27th, 1903, and he went to see them; that he saw Miss Ellis and she stated that there was an item of \$75 missing on the books and they thought it was the Gasch Bros. item, and that they would like to see the boy; that he then went to Gasch Bros. to see what was in the letter; that he then sent for the boy and took him to the office of Douglass & Douglass; that Mr. Douglass questioned the boy and the boy pointed out Miss Ellis as the person to whom he gave the letter from Gasch Bros.; that he did not authorize Mr. Douglass to have the boy arrested; that the boy was employed by the Postal Telegraph Cable

Co. in February, 1903, and was laid off on account of his wheel being broken for two weeks, and then came back and is now district messenger clerk, which is a promotion; that his company has had no other trouble with the boy and his character is the best; that he was present when Miss Ellis and Mr. Douglass testified before the justice of the peace, and both of them testified that it was two weeks before the loss of the \$75 was reported.

On cross examination the witness gave evidence tending to prove that no complaint could have been made without his having knowledge of it; that Miss Staley told him that \$75 was in the
17 envelope which she gave the boy.

GEORGE W. RIBBLE a witness next called on behalf of the defendant gave evidence tending to prove that he is superintendent of the Postal Telegraph Cable Co., and was such on May 27, 1903; that he did not authorize Douglass & Douglass to have the messenger boy arrested; that his company does not carry money packages if it knows it; that the rule is that when it is known the package contains valuables the sender is informed that it is taken at his risk.

On cross examination the witness gave evidence tending to prove that his company has no published rule or regulation as to any limit upon its liability and the messenger boys take letters, parcels etc. without asking any questions as to the contents, and the charge is based on the distance the messenger has to go.

Whereupon the defendant announced the close of its case.

And thereupon the plaintiff recalled Miss JENNIE HARVEY who gave evidence tending to prove that the writing "Chg. Douglass & Douglass" on the back of the slip which is in evidence is hers, and was put there by her when the messenger boy came back to the office of Douglass & Douglass to get authority to charge the call; that no letter or package was delivered to her at that time; that at the interviews between the boy and Mr. Douglass, the boy pointed out Miss Ellis as the one to whom the letter was delivered and that he so testified before the justice of the peace.

This being all the evidence in the case the defendant by its counsel moved the court to instruct the jury to return a verdict for the defendant, and after argument by counsel for both parties the court granted the motion and instructed the jury to bring in a verdict for the defendant.

And to the granting of said motion the plaintiff by his counsel, then and there excepted, and said exception was noted upon the minutes of the court before the jury rendered their verdict and the said counsel for the plaintiff prays the court to sign and seal this the
18 plaintiff's bill of exceptions to the said ruling of the court,
which is accordingly done, this 10th day of January, 1905.,
now for then.

JOB BARNARD, *Justice.*

Approved 1/10/05

MILLAN & SMITH,

Att'ys for Defendant.

19 Supreme Court of the District of Columbia.

FRIDAY, *January 13, 1905.*

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * *

CHARLES WHITE, Pl'ff,	} At Law. No. 46642.
v.	
POSTAL TELEGRAPH-CABLE Co., Def't.	

Upon motion of the plaintiff, the time within which to file the transcript of record in the appellate court be, and hereby is extended until February 15th, 1905.

Order for Transcript of Record.

Filed Jan. 13, 1905.

In the Supreme Court of the District of Columbia, the 13 Day of January, 1905.

CHAS. WHITE, Trading as Chas. White & Co.,	} Law. No. 46642.
vs.	
THE POSTAL TELEGRAPH-CABLE Co.	

The clerk of said court will please prepare transcript of record in the above entitled cause, and include transcript of justice of peace, bill of particulars and all proceedings in this court.

BAKER & SHERRILL,
Attorneys for White.

20 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, { ss :
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 19, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 46,642, at law, wherein Charles White is plaintiff, and The Postal Telegraph and Cable Company is defendant, as the same remains upon the files and of record in said court.

14 CHARLES WHITE VS. POSTAL TELEGRAPH AND CABLE COMPANY.

Seal Supreme Court of the District of Columbia. In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of February, A. D. 1905.

JOHN R. YOUNG, *Clerk*,
By WM. E. WILLIAMS,
Ass't Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1517. Charles White, appellant, vs. Postal Telegraph and Cable Company. Court of Appeals, District of Columbia. Filed Feb. 14, 1905. Henry W. Hodges, clerk.

MAR 10 1905

Henry W. Hodges,
clerk

Court of Appeals, District of Columbia

JANUARY TERM, 1905.

No. 1517.

CHARLES WHITE, PLAINTIFF,

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

BRIEF FOR APPELLANT.

BAKER & SHERRILL,
Attorneys for Appellant.

Court of Appeals, District of Columbia.

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CHARLES WHITE, PLAINTIFF,

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This is an action of assumpsit for money had and received by the defendant (now appellee) to the use of the plaintiff (now appellant) and was commenced before a justice of the peace. From the judgment for plaintiff entered there, an appeal was taken to the supreme court of the District of Columbia, and upon the trial, after all the evidence was in, a motion to instruct the jury to return a verdict for the defendant was granted by the court. From the judgment entered upon said verdict this appeal is taken.

The facts adduced at the trial below are as follows:

Appellee, The Postal Telegraph-Cable Company, is a corporation doing business in the District of Columbia, and

as a part of its business is engaged in supplying messenger service to the public. For this purpose it has in its employ a number of boys whose duty it is to respond to calls for messenger service and extends to all manner of service that can be performed by a boy walking or on a bicycle. For the convenience of its patrons the company has electric call-boxes installed in various business and private houses in the city. Charges for messenger service are based on the distance the messenger has to go, and not according to the size, value, or character of the article to be carried. Under the rules of the company, when an article is offered for delivery, no questions are asked concerning its value or character, and no notice is given in any manner whatsoever of any limitation upon the liability of the company or the agency of the messenger boys.

There was some evidence tending to prove that it is a custom of the company not to carry money packages at the usual rates, but this custom is not the subject of any notice, special or general, to its patrons, and does not appear to be known to any one outside the employ of the company.

The appellant, Charles White, was the owner of certain promissory notes, bearing interest, which he had placed in the possession of Douglass & Douglass as his agents for certain purposes, among which was the collection of the interest at stated intervals. On May 27, 1903, an installment of interest, amounting to \$75, became due, and Douglass & Douglass addressed a letter to Gasch Brothers, the agents of the makers of said notes, calling upon them for the interest and enclosing a signed receipt for the same. A messenger was then called from the office of the Postal Telegraph-Cable Company, the electric call-box located in the office of Douglass & Douglass being used for that purpose. One Ernst Barnes, a messenger boy in the employ of appellee, responded to the call and was given the letter addressed to Gasch Brothers, with instructions to deliver it and to

bring back an answer. He delivered the letter to a clerk in the office of Gasch Brothers, and received an envelope containing \$75 in currency to be returned. He testified that he brought the envelope to the office of Douglass & Douglass and delivered it to Miss Ellis, in the presence of Miss Harvey, both clerks in said office. He did not get a receipt for the return letter, although the rules of the company required him to do so. Miss Ellis and Miss Harvey testified that Barnes did not deliver the return letter to them or either of them. The evidence is conflicting as to when the loss was reported to appellee, but by the testimony of its own witnesses appellee is shown to have received notice about two weeks after the date of the service—that is to say, about June 15. Appellee made an investigation of the reported loss at this time, and was fully informed of all the facts in relation to the matter and of the contents of the envelope which Barnes failed to deliver. Notwithstanding this notice and with full knowledge of the facts, appellee, on July 1, accepted payment for the services of Barnes.

ASSIGNMENT OF ERROR.

The court erred in instructing the jury to return a verdict for the defendant.

ARGUMENT.

The learned justice below held that this action should fail for two reasons, viz :

1. The evidence failed to show the receipt of the money by the defendant.

2. The evidence in support of the alleged failure of the messenger boy to deliver the return letter was insufficient to go to the jury.

I.

The evidence establishes that Barnes, the messenger boy, was in the employ of appellee, and had been for several months; that it was his duty to act for appellee in the carriage and delivery of letters, parcels, and packages to the extent of his ability to do so walking or on a bicycle; that this duty extended to the acceptance of all letters, packages, or parcels, without regard to their contents or value and without question, for and on behalf of the appellee, and charges for such services were made according to the distance the messenger had to go in the performance of his duty.

Upon these facts, it is submitted that Barnes was the general agent of appellee for all purposes within the scope of his employment, and as such agent his receipt of the envelope containing the money was the receipt of appellee. The evidence shows conclusively that Barnes received the envelope containing \$75 from the clerk in the office of Gasch Brothers. There was no limitation upon the agency of Barnes in acting for appellee, which was known to the public or appellant, and it is submitted that appellant, in dealing with Barnes within the scope of his apparent authority, was dealing with appellee, and was not bound by any secret instructions to Barnes or limitation upon his agency unknown to him and which he had no legal duty to know.

"A general agent is one who is given authority to act in a certain character, and unless it is restricted to a smaller limit, and the restriction is known or ought to be known to third parties, carries with it all the ordinary powers incident to that character."

Story on Agency, § 58.

Evans on Agency, § 134.

Butler vs. Maples, 9 Wall. (U. S.), 766.

"The authority of a general agent is measured by the usual course and character of the business he is empowered to transact; and for any act done by him which is natural

or customary in the management of such business, the principal cannot avoid liability because of any secret instructions or limitation imposed on the agent."

Louisville Coffee Co. vs. Stakes, 78 Ala., 372.

Nat. Furnace Co. vs. Keystone Mfg. Co., 110 Ill., 427.

"The scope of an agent's authority is to be determined, not only from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction."

Kingsley vs. Fitts, 51 Vt., 414.

"Where the duly authorized agent of a railroad company receives personal property as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage."

Chicago R. Co. vs. Conkling, 32 Kan., 55.

There is no rule of law or statute exempting appellee from the ordinary law of agency, and there is nothing in the character of the business carried on by it which would operate to change that status. In the case of *American Dist. Tel. Co. vs. Walker*, 72 Md., 454, the plaintiffs had hired a buggy and horses, and, on returning, stopped at the office of the defendant company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but, owing to his negligence and incompetency, the horses ran away and injured themselves and the vehicle. It was held that the company was liable for the damages thus caused, and Mr. Chief Justice Alvey, speaking for the court, said:

"The boy was furnished from the defendant's office to take charge of and drive the team of horses to the livery stable, and having assumed the duty for a reward, the defendant was bound to furnish a driver both competent and careful."

It might be said that in the above case the defendant knew what character of service it was undertaking to per-

form, while here appellee was in ignorance of the contents of the envelope intrusted to its agent for delivery. It is submitted, however, that the service here was consistent with the ordinary business of appellee, and appellee was bound by what he ought to have known in the exercise of ordinary care its agent was doing in the usual scope of his employment (*Kingsley vs. Fitts*, 51 Vt., 414).

Again, it was held in the case of *Feiber vs. Manhattan Dist. Tel. Co.* (C. Pl., Gen. T.), 22 Abb. N. Cas. (N. Y.), 121, that such a company is liable for the loss of a package caused by one of its messengers delivering it contrary to the instructions of the sender.

So also in the case of *Sanford vs. American District Tel. Co.*, 13 Miscell (N. Y. C. Pl.), 88, a case very similar to this, in which it appeared that a package containing money was sent by a messenger of the defendant company for deposit in a bank and was not delivered, it was held that the defendant was undoubtedly liable for the loss in a proper action, although no recovery could be had in that particular action.

It is further submitted that even if the act of Barnes in receiving a money package for delivery was unauthorized, and his agency was limited by the custom of the company not to carry money packages at the usual rates, appellee is nevertheless liable in this case on account of the fact that it confirmed and ratified the act of Barnes by accepting compensation for his services with full knowledge of all the facts.

An unauthorized act by one assuming to be an agent for another may be ratified by the principal, and such ratification gives to the act the same effect as if it were previously duly authorized.

Fleckner vs. U. S. Bank, 8 Wheaton, 338.

Drakeley vs. Gregg, 8 Wall., 242.

The ratification of an agent's acts with knowledge of the circumstances relates back to the time when such acts were performed, and binds the principal the same as if authority had been given in advance.

Story Agency, pars. 239-242.

Where the principal accepts the results of the agent's unauthorized act it will be a ratification.

96 U. S., 640.

II.

As to whether there was sufficient evidence to go to the jury upon the question of the delivery or non-delivery of the envelope containing the money, it is submitted that the record discloses a concise issue of fact which the jury should have been allowed to pass upon. Barnes testified that he delivered the envelope to Miss Ellis in the presence of Miss Harvey a short time after receiving it, but failed to get a receipt for it because he forgot to do so. Both Miss Ellis and Miss Harvey testified that Barnes did not deliver the envelope to them at any time. It was for the jury to pass upon this issue of fact.

BAKER & SHERRILL,
Attorneys for Appellant.

COURT OF APPEALS,
DISTRICT OF COLUMBIA.
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BRIEF FOR APPELLEE.

W. W. MILLAN,
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Court of Appeals, District of Columbia.

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POSTAL TELEGRAPH-CABLE COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

Appellant's brief does not give a statement of the case sufficiently full and complete to present the questions for review, and we add the following :

This action was begun, in form *ex contractu*, before a justice of the peace, for the purpose, as indicated by the bill of particulars there filed, of recovering money had and received by the appellee to the use of the appellant (Rec., p. 1). From the judgment for the plaintiff, entered there, an appeal was taken to the supreme court of the District of Columbia, and upon the trial, after all the evidence was in, the court granted a motion to instruct the jury to return a verdict for the defendant.

The facts in the case, as disclosed by the record, are as follows :

Douglass & Douglass, a firm of lawyers, called a messenger of the appellee company, using for that purpose a call-box located in their office (Rec., p. 7). When the boy responded he was given a letter addressed to Gasch Brothers, a firm of real-estate brokers, with instructions to deliver it and bring back an answer. The letter (Rec., p. 6) requested Gasch Brothers to send to Douglass & Douglass a check for \$75 in payment of an installment of interest on certain notes which they held, for the purpose of collecting the interest for the appellant.

The boy delivered the letter to a clerk in the office of Gasch Brothers, who put \$75 in currency into an envelope (Rec., p. 6), addressed it to Douglass & Douglass, and gave it to the boy to be delivered. The boy says he delivered it to a clerk in the office of Douglass & Douglass, but she says he did not (Rec., pp. 7, 8). The compensation for the services of the messenger was according to the distance traveled and not according to the value of his burden (Rec., p. 12). The boy took a receipt for the letter delivered to Gasch Brothers, and a clerk in the office of Douglass & Douglass indorsed the same with a memorandum directing the charging of the service to the latter firm (Rec., p. 9).

ARGUMENT.

ON THE WHOLE CASE, THE ACTION OF THE COURT BELOW WAS
RIGHT.

The record does not disclose the ground on which the learned trial justice directed a verdict, and therefore the question now to be determined is whether, on the whole case, his action was proper. The grounds which appellant's counsel state as those upon which the trial court acted must, however, be challenged, as they wholly misstate the trial court's action. The verdict was directed because the action, if it could be maintained at all, could not be maintained in its present form.

I.

ACTION WRONG IN FORM.

The action is *ex contractu*. Appellant therefore cannot maintain it. No contract was proven between him and appellee, nor was it attempted to show that the messenger boy was authorized to make any contract for the appellee.

Sanford *vs.* American District Telegraph Co., 34 Supp. (N. Y.), 144.

Reference is also made to the case of Morris J. Hirsch *vs.* same company, not reported, decided by the New York Supreme Court, Appellate Term, October, 1904, on appeal by defendant from a judgment by the City Court, entered under direction of the court, in plaintiff's favor. Copy of opinion printed as an addendum to this brief.

II.

NO PRIVACY OF CONTRACT BETWEEN APPELLANT AND APPELLEE.

There is no testimony that Douglass & Douglass were appellant's agents for the purpose of employing appellee. Mr. Douglass testified that he was the agent of appellant for the purpose of a certain collection (Rec., p. 4), but there is no testimony tending to show that he was White's agent for the purpose of employing the appellee to make the collection or to run the errand. Mr. Douglass' testimony shows his relation to the appellant to be that of attorney charged with the collection of interest on a certain note, for which it is fair to presume he was to charge his ordinary fee and perform the service ordinarily incident to such a matter. Such employment does not constitute the attorney, general agent of his client. The em-

ployment of messenger boys is not incident to the collection of accounts by attorneys under the practice of attorneys in this jurisdiction. This is so well known that the court will take notice thereof without proof. Douglass & Douglass were, therefore, the contracting parties (Rec., pp. 4 and 6). They summoned the boy and paid the bill of appellee (Rec., pp. 4 and 5). So far as is shown, the only connection appellant has with the case is that his name is used in the caption. The case presents features similar to *Savings Bank vs. Ward*, 100 U. S., 195, where the court said :

"Suffice it to say these parties never met and there was no communication of any kind between the defendant and the brokers or the lenders of the money. Nothing of the kind is pretended, the only suggestion in that direction being that it may be held that the applicant for the loan when he employed the defendant, may be regarded as the agent of the plaintiffs. Such suggestion being entirely without evidence to support it is entitled to no weight." * * *

It does not appear by anything in the case that appellant has, even subsequently, ratified the act of Douglass & Douglass in employing the appellee, and we submit that it is in accordance with common business sagacity that he has not ratified it and will not do so.

If we look beyond Douglass & Douglass, we find a *nudum pactum*. The evidence does not show that Charles White paid this appellee a penny for the services rendered on this occasion. To contend that he did, it must be shown that the payment of twenty cents testified to by Douglass was a payment for the appellant; but the testimony shows it was a payment by Douglass & Douglass (Rec., p. 5). It was included in their monthly bill, amounting to \$7.71, and there is no testimony to show that Douglass & Douglass ever claimed to have paid it on account of appellant, and appellant does not claim that he has reimbursed Douglass & Douglass, that he knew anything about the expenditure; or

that he has ratified it. The record does not show that appellant was even so much as present in court when the case was tried to testify to these or other things.

III.

MESSENGER COMPANIES NOT INSURERS.

The liability of a messenger company is not that of a common carrier. The only case counsel have been able to find where the court considers extensively the status of a carrier of this kind is that of

Hayes *vs.* Wells Fargo Company, ²³~~22~~ Calif., 185.

In that case the doctrine is announced that—

“Common carriers who are engaged in the transmission and delivery of letters inclosed in envelopes, are not liable for any articles of special value inclosed within the envelope, or for any loss beyond that of an ordinary letter, unless informed at the time they received the letter for transmission, of the value of the same.”

This appears to us to be in accordance with sound reason. It is a matter of common knowledge that district messenger companies employ as messengers young boys of average intelligence, and for their services charge their patrons but a small sum, based upon the distance the boy goes or the time he is out (Rec., p. 11). The demand of the public for cheap service is met by employees of this character. It cannot be within reason that messenger companies are chargeable as insurers of every package handed to a small boy, called without any reference to his capacity to perform the special errand. It appears to us that there is a duty, of which the courts will take notice, owing to the messenger company, and to the boy as well, by the temporary employer to exercise common discretion in

the duty assigned the messenger. The boy was subject to the control of Douglass & Douglass, for whom he was performing service. He was their agent. To make messenger companies insurers of the safety of the thing intrusted to their messenger boys without notice to the company of the value of the property would strike down the convenient system of messenger service, upon which business men in every city have so large reliance. In its very nature it could not be maintained under such conditions.

IV.

DAMAGES NOT IN CONTEMPLATION OF PARTIES.

Irrespective of the questions already raised, the damages sought to be recovered by the appellant were never in contemplation of the parties. The boy was to return an *answer*, which is a very broad word in this case, and the evidence shows he was entrusted with *currency*, while the answer expected and requested by Douglass & Douglass was a *check*. If, therefore, the appellee is chargeable constructively with contracting with appellant, we submit that the doctrine is satisfied to the extreme when he is made to know the nature of the reply desired by Douglass & Douglass, and that his knowledge cannot be extended to include what some third party may do. The risk was raised by Gasch Brothers when currency instead of a check was put in the letter. Even Douglass & Douglass could not have in contemplation the fact that currency was to be returned.

Hadley *vs.* Baxendale, 9 Exchq., ⁵⁴⁵⁻254, which is followed by the courts of this country.

Primrose *vs.* W. U. Tel. Co., 154 U. S., 1 (see p. 30).

ACTION AGAINST WRONG PARTY.

If there was an implied contract between the parties to return a check to Douglass & Douglass, and the boy was the agent of the appellee to make that contract, he made the contract when he agreed with Douglass & Douglass to perform the service. When he departed from the terms of that contract he exceeded his authority. He was certainly not constructively authorized to make a contract, and then constructively authorized to cancel it and substitute another contract. The extent of his right to bind appellee, if he could bind it, which we deny, was only to agree to do what Douglass & Douglass directed him to do. Hence, his receipt of the currency was not an act of appellee, but of himself, the messenger boy, or of Gasch Bros., who intrusted it to him.

If, for the sake of argument, the boy is admitted to be an agent of appellee for the purpose of receiving of Gasch Bros. currency instead of a check, still he did not receive it to the use of White, the appellant, but to the use of Douglass & Douglass, who employed him, and who alone had the right to direct him, and to whom alone he was authorized to deliver the envelope containing the money.

Respectfully submitted.

W. W. MILLAN,

R. E. L. SMITH,

Attorneys for Appellee.

ADDENDUM.

N. Y. SUPREME COURT, APPELLATE TERM,
OCTOBER, 1904.

Before Freedman, P. J., Bischoff, J., Fitzgerald, J.

MORRIS J. HIRSCH, *Plaintiff-Respondent*,
vs.
AMERICAN DISTRICT TELEGRAPH Co., *Defendant-Appellant*. }

Appeal by the defendant from a judgment of the City Court entered in favor of the plaintiff upon a verdict directed by the court, and also from an order denying defendant's motion for a new trial.

George H. Fearons, Albert T. Benedict, Francis Raymond Stark, for appellant.

Herbert H. Maass, Charles Grossman, for respondent.

FREEDMAN, P. J. :

The direction of a verdict for the plaintiff cannot be sustained. In form the action was brought on a contract alleged to have been made by the defendant with one Jantzen, the plaintiff's assignor, whereby defendant agreed to transport and deliver for said Jantzen a package or envelope containing \$600 in money to the Rutherford National Bank, at Rutherford, N. J. At the trial it was shown that the package or envelope containing the money was entrusted by Jantzen to a messenger furnished by the defendant and that the messenger absconded with the money, but the proof did not establish the contract sued upon, but only a contract made by defendant with Jantzen to furnish him with a messenger whose services Jantzen was to have the privilege of using as long as he saw fit and in whatever way he saw fit, for which services Jantzen was to pay at a fixed rate per hour. It was also clearly shown that

Jantzen himself selected the messenger from among a number on hand in defendant's office and himself gave him the package with instructions what to do with it. In directing a verdict the trial judge was bound to consider the evidence in the aspect most favorable to the defendant, and under the operation of this rule the evidence showed no more than I have stated. It was therefore error to direct a verdict for the plaintiff. The liability of the defendant in a case of this kind has been so fully discussed in *Sanford v. American District Telegraph Co.*, 13 Misc., 88, that further discussion here is unnecessary.

The judgment and order should be reversed and a new trial ordered with costs to the appellant to abide the event.